

405 KAR 10:040. Procedures, criteria and schedule for release of performance bond.

RELATES TO: KRS 350.060, 350.064, 350.093, 350.113, 350.151, 350.465, 30 C.F.R. Parts 730-733, 735, 800.40, 917, 30 U.S.C. 1253, 1255, 1269

STATUTORY AUTHORITY: KRS Chapter 13A, 350.020, 350.028, 350.060, 350.064, 350.093, 350.151, 350.465, 30 C.F.R. Parts 730-733, 735, 800.40, 917, 30 U.S.C. 1253, 1255, 1269

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 in pertinent part requires the cabinet to set out by regulation procedures and criteria for the release of performance bond. This administrative regulation specifies the procedures, criteria, and schedule, including reclamation phases, for the release and partial release of liability under performance bonds. This administrative regulation also sets forth certain notice and hearing requirements pertinent to bond release.

Section 1. Procedures for Release of Performance Bond. (1) Application for bond release. The permittee or any person authorized to act on his or her behalf may or the cabinet shall, initiate an application for release of all or part of the performance bond liability applicable to a particular permit or increment after all reclamation, restoration and abatement work in a reclamation phase as defined in Section 2(4) of this administrative regulation has been completed on the entire permit area or increment.

(a) Bond release applications may only be filed at times or seasons that allow the cabinet to evaluate properly the reclamation operations alleged to have been completed.

(b) Within thirty (30) days of the initiation of any bond release request, the permittee shall submit copies of letters which it has sent to adjoining property owners, surface owners (their agents and lessees), local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the surface coal mining and reclamation operation took place, notifying them of the intention to seek release from the bond. For bond releases initiated by the cabinet, the cabinet shall undertake the notification requirements set forth in this subsection. The notices shall also state that these individuals and their representatives may participate in a bond release inspection by contacting the cabinet. These notices shall be sent at the time the permittee initiates the application for release.

(c) Upon the filing of an application for bond release by a permittee, or the initiation of such release by the cabinet, the cabinet shall notify, by certified mail, within thirty (30) days of such filing or initiation, the municipality or county judge-executive where the surface coal mining operation is located.

(d) Within thirty (30) days after advertising an application for bond release as per the requirements of subsection (2) of this section, the permittee, or the cabinet if it elected to advertise as per subsection (2) of this section, shall submit proof of said publication. Proof of publication shall be placed, by the cabinet, with the bond release application. Such proof of publication shall be considered part of the bond release application.

(2) Public notice. At the time of initiating an application for bond release under this section, the permittee shall, and the cabinet may at permittee expense, advertise the filing of the application in the newspaper of largest bona fide circulation according to the definition in KRS 424.110 to 424.120 in the county or counties in which the permit area is located. Said advertisement shall begin within sixty (60) days of the initiation of any application for bond release whether said bond release application is initiated by the permittee or the cabinet. Should the cabinet initiate a bond release pursuant to this subsection but choose not to advertise the release pursuant to this section, and the permittee does not advertise the request for the release within the time schedules established by this subsection, the bond release application shall be denied. The advertisement shall be placed in the newspaper at least once a week for four (4) consecutive weeks. The advertisement shall contain:

(a) The name of the permittee, the permit number and the date of issuance or renewal of the

permit or increment;

(b) The precise location and the number of acres of the lands subject to the application;

(c) The type and total amount of bond filed for the permit area or increment and the reclamation phase for which release is sought;

(d) The type and approximate dates of reclamation work performed;

(e) A description of the results achieved as they relate to the permittee's approved reclamation plan;

(f) A statement that written comments, objections, and requests for a public hearing may be submitted to the cabinet, provide the appropriate address of the cabinet, and the closing date by which comments, objections, and requests must be received;

(g) A statement that a public hearing has been scheduled, including the date and location of the hearing; and

(h) A statement that the scheduled public hearing shall be cancelled if the cabinet does not receive a request for the public hearing by the closing date for requests for hearing.

(3) Objections, comments or requests for public hearing prior to bond release.

(a) Any person with a valid legal interest which might be adversely affected by release of the bond, or the responsible officer or head of any federal, state, or local governmental agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objections to the proposed release from bond and, if desired, file a request for a public hearing with the cabinet within thirty (30) days after the last publication of the notice required by subsection (2) of this section.

(b) The cabinet shall schedule a public hearing for each request for bond release, such hearing to be scheduled within five (5) working days of the end of the public comment period. If the cabinet does not receive a request for a public hearing by the end of the public comment period, the cabinet shall cancel the public hearing. The public hearing shall be held in the locality of the surface coal mining operation for which bond release is sought. The person requesting the release shall contact the cabinet prior to beginning advertisements under subsection (2) of this section to obtain the date and location of the public hearing in order to include this information in the advertisement.

(c) The hearing under paragraph (b) of this subsection shall be legislative in nature and the provisions of 400 KAR 1:090 and 400 KAR 1:110 shall not apply. The cabinet shall have the authority to administer oaths, subpoena witnesses or written or printed material, compel the attendance of witnesses or the production of materials, and take evidence including, but not limited to, inspection of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity. A verbatim record of each public hearing shall be made, and a transcript shall be made available on the motion of any party or by order of the cabinet.

(d) Without prejudice to the right of an objector or the applicant and upon agreement of all parties, the cabinet may hold an informal conference in accordance with the procedures in 405 KAR 8:010, Section 11 for permit conferences to resolve such written objections in lieu of the public hearing under paragraph (b) of this subsection. The informal conference shall be held at the same time and location as was scheduled for the public hearing. The cabinet shall make a record of the informal conference unless waived by all parties, which shall be accessible to all parties. The cabinet shall also furnish all parties of the informal conference with a written finding of the cabinet on the informal conference, and the reasons for said finding.

(4) Inspection and evaluation. The cabinet shall inspect and evaluate the reclamation work involved within thirty (30) days after initiation of a bond release request by the permittee, or any person authorized to act on his or her behalf, or as soon thereafter as weather conditions permit. The evaluation shall consider, among other factors, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future

occurrence of such pollution, and the estimated cost of abating such pollution. The surface owner, agent, or lessee known to the cabinet shall be given notice of such inspection and may participate with the cabinet in making the bond release inspection. The cabinet may arrange with the permittee to allow access to the permit area, upon request by any person with an interest in bond release, for the purpose of gathering information relevant to the proceeding.

(5)(a) Notice of decision. The cabinet shall as described in paragraph (b) of this subsection provide notification in writing of its decision to release or not to release all or part of the performance bond within five (5) days following receipt of proof of public advertisement as required in this section, or within five (5) days of the end of the thirty (30) day public comment period provided for in subsection (3) of this section, whichever is later. Provided, however, that if an informal conference or public hearing has been requested pursuant to subsection (3) of this section, the cabinet shall provide its notice of decision within thirty (30) days following said informal conference or public hearing.

(b) The notice of the decision shall state the reasons for the decision, recommend any corrective actions necessary to secure the release, and notify the permittee, the surety, any person with an interest in collateral who has previously requested such notification in writing, persons who filed objections in writing, and objectors who were a party to the informal conference or public hearing of their right to request, within thirty (30) days of notice, a formal hearing as provided for by subsection (6) of this section. Where the decision is to release all or part of the performance bond, the notice shall state that the release shall occur fourteen (14) days after the date of the decision unless temporary relief is granted under 400 KAR 1:110, Section 12.

(c) In no event shall the cabinet disapprove an application for reclamation phase I or II release of a surety bond or a bond secured by a letter of credit solely upon the permittee's failure to pay penalties or fines, if applicable reclamation requirements for the requested release have been fully met.

(6) Requests for formal hearing after bond release or denial. Any person aggrieved by the decision of the cabinet to approve or disapprove a bond release application, in whole or in part, shall have the right to request a formal hearing pursuant to 400 KAR 1:110, Section 9. When the cabinet has decided to release all or part of the performance bond, the release shall not occur until fourteen (14) days after the date of the decision. At the end of that fourteen (14) days, the cabinet shall effect the release unless temporary relief is granted under 400 KAR 1:110, Section 12.

Section 2. Criteria and Schedule for Release of Performance Bond. (1) Monies pledged under performance bonds shall not be eligible for release until the permittee has met the requirements of the applicable reclamation phase as defined in subsection (4) of this section. The cabinet may release portions of the monies pledged under performance bonds applicable to a permit or increment following completion of reclamation phases on the entire permit area or entire increment.

(2) The maximum portion of the monies pledged under performance bonds applicable to a permit area which may be released shall be calculated on the following basis:

(a) Release an amount not to exceed sixty (60) percent of the total original bond amount on the permit area, section, or increment upon completion of phase I reclamation.

(b) Release an additional amount not to exceed twenty-five (25) percent of the total original bond amount on the permit area or increment upon completion of phase II reclamation, but in all cases the amount remaining shall be sufficient to reestablish vegetation and reconstruct any drainage structures.

(c) Release the remaining portion of the total performance bond on an entire permit area or increment after standards of phase III reclamation have been attained on the entire permit area or increment and final inspection and procedures of Section 1 of this administrative regulation have been satisfied. After the final bond release for phase III reclamation on an increment, the increment shall be deleted from the permit area.

(3) The cabinet shall not release any monies pledged under performance bonds applicable to a

permit if such release would reduce the total remaining monies pledged under performance bonds to an amount less than that necessary for the cabinet to complete the approved reclamation plan, achieve compliance with the requirements of KRS Chapter 350, 405 KAR Chapters 7 through 24 or the permit, and abate any significant environmental harm to air, water or land resources or danger to the public health and safety which might occur prior to the release of all performance bond liability for the permit area.

(4) Reclamation phases are defined as follows:

(a) Reclamation phase I shall be deemed to have been completed on the entire permit area or increment when the permittee completes backfilling, regrading, topsoil replacement, and drainage control including soil preparation and initial seeding and mulching in accordance with the approved reclamation plan and a report for the area has been submitted to the cabinet in accordance with 405 KAR 16:200, Section 8 or 405 KAR 18:200, Section 8;

(b) Reclamation phase II shall be deemed to have been completed on the entire permit area or increment when:

1. Revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation, except productivity standards, have been met;

2. The lands are not contributing suspended solids to stream flow or run off outside the permit area or increment in excess of the requirements of KRS 350.420, 405 KAR Chapters 16 or 18, or the permit;

3. With respect to prime farmlands, soil productivity has been restored as required by 405 KAR 20:040, Section 6 and the plan approved under 405 KAR 8:050, Section 3; and

4. The provisions of a plan approved by the cabinet for the sound future management of any permanent impoundment by the permittee or landowner have been implemented to the satisfaction of the cabinet.

(c) Reclamation phase III will be deemed to have been completed on the entire permit area or increment when the permittee has successfully completed all surface coal mining and reclamation operations in accordance with the approved reclamation plan, such that the land is capable of supporting the postmining land use approved pursuant to 405 KAR 16:210 or 405 KAR 18:220; and has achieved compliance with the requirements of KRS Chapter 350, 405 KAR Chapters 7 through 24, and the permit; and the applicable liability period under 405 KAR 10:020, Section 3(2) has expired. (8 Ky.R. 1519; eff. 1-6-1983; 15 Ky.R. 447; 2016; eff. 1-25-1989; 17 Ky.R. 2499; eff. 4-24-1991; TAm eff. 5-4-2018; Crt eff. 7-3-2018.)